IN THE

Supreme Court of the United States

OCTOBER TERM 1940

No. 901

BAKERY AND PASTRY DRIVERS AND HELPERS LOCAL 802 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, PETER SULLIVAN, individually and as President of the said Union, PADDY SULLIVAN, individually and as an officer of the said Union, and HYMAN BERNSTEIN, individually and as business agent of said Union, all of 265 West 14th Street, New York City,

Petitioners,

against

HYMAN WOHL and LOUIS PLATZMAN,

Respondents.

REPLY BRIEF FOR PETITIONERS

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POINT I

The Respondents' brief misstates the facts.

It is with deep regret that we are obliged to state that in our considered opinion the Respondents' brief represents a brazen and deliberate attempt to mislead the Court by falsifying the material facts in the case at Bar. The unblushing audacity and complete recklessness with which the authors of the Respondents' brief have misstated the

facts is utterly astounding. It is indeed unfortunate that the Respondents have seen fit to approach the issues in this manner and we are glad to be able to state that this is the first instance in the course of our experience before the Bar that such an abuse of the brief writer's privileges has been met.

We are confident that the Court will not be misled by the misstatements contained in the Respondents' brief, but we feel obliged briefly to point out the major falsehoods before resuming the main thread of our argument.

Among the most glaring misstatements found in the Respondents' brief are the following:

a. The statements at page 6 of the Respondents' brief:

> "Petitioners did not show that they had ever appealed to the public, retail stores or bakers protesting against the alleged evils of the peddler system."
>
> "The Trial Court saw through this sham, in its decision, when it found that the intent and primary purpose of the Union was to compel the respondents to hire unnecessary help."
>
> "The attempt of the Union to change its position after litigation was commenced by relying upon the 'peddler system' in an effort to justify and escape the consequences of its conduct, did not deter the Trial Court in determining the true intent of the combination."

b. The statement at page 23 of the Respondents' brief:

> "It was only after litigation commenced that the Union first raised the peddler system in an attempt to justify its legal conduct. However, the uncontradicted testimony, as well as the findings of the Trial Court, as affirmed by the Appellate Courts, showed that the Union really relied upon the peddler system as a pretext, and that it was not advanced in good faith."

c. The statement at pages 38 and 39 of the Respondents' brief:

> "The petitioners' brief admits that no general course of picketing or publicity against the peddler system was resorted to in this case similar to that of the Meadowmoor and Lake Valley cases. Whereas, in those cases the specific object of the Unions was to expose, eradicate and destroy the peddler system by a trade wide campaign of picketing against numerous manufacturers and retailers, the specific object of the petitioners herein was an attempt to foist unnecessary employees upon the respondents."

d. The statement at page 39 of the Respondents' brief:

> "The petitioners' brief states on page 4 that the respondents conceded that there was no fraud practiced by the Union and rely therefor upon the respondents' concession that there was no misrepresentation. No concession, regarding fraud was ever made. Although the placard used by the Union truthfully stated a fact, it referred to the respondents as 'a bakery route driver', which together with oral statements that non-union drivers were delivering merchandise to retail stores could reasonably give a person the impression that the respondents were not owners but merely non-union employees. This might be considered a species of fraud."

The complete refutation of the foregoing misstatements of the facts is found in the decision of the Trial Court (R. 46-60). The Respondents evidently feel at liberty to disregard the findings of the Trial Court despite the fact that they themselves have never questioned these findings and although such findings are conclusive upon appellate tribunals.

The attorney for the Respondents explicitly conceded upon the trial that no misstatements had been made by the Petitioners (R. 148), and the Trial Court so found (Finding No. 54, R. 55).

The decision of the Trial Court definitely establishes that the activities of the Union were directed against the

evils of the peddler system, and that reference to that system was neither a sham nor an afterthought. In refutation of the above quoted statements in the Respondents' brief, we merely quote the following Findings contained in the decision of the Trial Court:

(*Concerning the Status of the Plaintiffs.*)

"4. That the plaintiffs are peddlers engaged in the business of buying baked food products from different manufacturing bakers and reselling them to grocery stores" (R. 47).

(*Concerning the Standards Achieved by the Union.*)

"26. That these conditions of the approximate 2700 organized drivers have been attained only after many years of effort involving organization of the men, that is, lawfully persuading them to become members of the union, collective bargaining with employers which resulted in agreements, and at times strikes which resulted in agreements, all such agreements prescribing the wages, hours and conditions of bakery drivers" (R. 50).

(*Concerning the Origin and Growth of the Peddler System.*)

"27. That approximately five years ago in New York City there were comparatively few 'peddlers' or so-called independent jobbers; that at most they numbered 50 and were largely men who had a long established retail trade" (R. 50).

"28. That the Social Security and Unemployment laws were put into effect approximately four years ago" (R. 51).

"29. That thereafter the number of 'peddlers' engaged in distributing bakery products increased substantially from year to year, until at this time there are in the City of New York more than 500 'peddlers' or independent jobbers" (R. 51).

(Concerning the Direct Injury Suffered By Members of the Union On Account of the Peddler System.)

"30. That in the past eighteen months several baking companies which theretofore operated bakery routes through using employed drivers on routes owned by the companies, at the expiration of their contracts with the union, which contracts prescribed minimum wages, hours, working conditions, etc., and a six-day week, notified the union that they would no longer employ such drivers, that they would no longer become parties to the agreements with the union of the nature aforementioned, and, after discharging the employee drivers, such companies proposed to such employee drivers that they purchase trucks for nominal amounts, in some instances $50.00, and thereupon, as 'peddlers' and jobbers purchasing the baked products from the companies, should undertake to serve such routes". (R. 51).

"31. That there were at least 150 drivers in such period mentioned in the previous paragraph who were members of the union and working under union conditions and contracts who, within the past eighteen months, were discharged and required to sever their connections with the companies for which they theretofore had worked, unless they agreed to and undertook to act as 'peddlers' or distributors, and that in approximately 50 of such instances the men did become 'peddlers' and thereupon abandoned their membership in the union" (R. 51).

"32. That 'peddlers' or independent jobbers are not covered by Workmen's Compensation Insurance, Social Security or Unemployment Insurance, and that an employer who changes his method of distribution from using employee drivers to 'peddlers' or independent jobbers saves considerable by way of premiums and taxes" (R. 52).

"33. That if those who are presently employers and parties to contracts wtih the unions upon the expiration of those contracts, to survive, are required to adopt the 'peddler' system of distribution, then the wages, hours, working conditions, six-day week, etc., attained by the union after long years of struggle will be destroyed and lost" (R. 52).

(Concerning the General Program of the Union With Reference to the Peddler System.)

"34. That the union, in good faith, knowing of the increase in the use of 'peddlers' for the distribution of baked products, in the Spring of 1938 made an effort to persuade the 'peddlers' to become members of the union" (R. 52).

"35. That those 'peddlers' who desired to become members of the union were admitted to membership and were only required to conform to and abide by the same Constitution and By-Laws, rules and regulations as were all other members and that included therein was a requirement that no union members should work more than six days per week" (R. 52).

"36. That the plaintiffs herein were asked to join the union, each of them signed an application to so do, but neither of them appeared at meetings that were thereafter called for those who had made applications, nor did they in any further respect act towards the establishment for them of membership in the union" (R. 52).

"37. That those 'peddlers' who did apply for membership and who took the necessary steps to acquire membership, were accepted into full membership in the union and the only requirements imposed upon them were that they conform to the Constitution and By-Laws and comply with the rules and regulations of the union which generally applied to all members" (R. 53).

"38. That the union thereupon determined that a reasonable restriction and regulation of the 'peddlers' was to seek an understanding with him, whether he was a member of the union or not, that he work for six days a week and that he employ for one day in a week an unemployed union member" (R. 53).

The above findings definitely establish that the activities of the Union were directed against the evils of the peddler system and that no petty, malicious plot against the particular plaintiffs herein involved was before the Court.

There is, of course, not a single word to be found in the decision of the Trial Court or elsewhere in the record to the effect that any "sham" on the part of the Petitioners herein ever occurred.

Findings 34 to 38, inclusive, above quoted, expose with crystal clarity the deliberate falsehood which has been made the basis of the Respondents' brief. The Trial Court definitely found that the Union in *good faith* entered upon a program to persuade peddlers to become members of the Union, and further, in the event the peddlers refused to become members of the Union, to persuade them to limit their days of labor to six days per week and to allow a member of the Union to perform the necessary work on the seventh day. In the face of these findings, which the Respondents have never previously questioned, which they cannot now question, and which were uncontroverted upon the trial, it is, indeed, shocking to be confronted with a statement, such as we find at page 23 of the Respondents' brief, declaring that:

> "However, the contradicted testimony, as well as the findings of the Trial Court, as affirmed by the Appellate Courts, showed that the Union really relied upon the peddler system as a pretext and that it was not advanced in good faith."

Throughout the Respondents' brief great liberties have been taken with the facts. An attempt to correct each misstatement would unduly extend this brief. We trust that we have given the Court sufficient warning of the unreliability of the alleged factual statements contained in the Respondents' brief, and that in no instance will our silence be deemed assent to the grossly distorted version of the facts presented by the Respondents.

POINT II

The activities of the petitioners were not contrary to any policy of the State of New York.

Whereas the record in the case at bar establishes without contradiction the direct economic injury sustained by members of the petitioners' Union as a result of the development and extension of the peddler distribution system, the record is utterly devoid of proof that the peaceful activities of the defendant Union have in any respect endangered the public welfare.

Notwithstanding the complete absence of such proof from the record, the Respondents have not hesitated to allege in their brief that helpless proprietors of small businesses have been systematically intimidated by various unions (inferentially including the petitioners herein) for the sole purpose of foisting unnecessary help upon them, and such conduct has been characterized as "nothing more than extortion" (p. 11).

Upon this reckless and unfounded charge the Respondents have with equal recklessness sought to base a wholly imaginary public policy of the State of New York to the effect that:

> "No Union may picket any of its small businessmen for the purpose of compelling them to hire unnecessary help, where such proprietors operate their business alone without any employees" (p. 10).

Neither the Legislature nor the Courts of the State of New York have ever recognized any such public policy. On the contrary, the Court of Appeals of the State of New York definitely holds that picketing may lawfully be conducted despite an employer's insistence upon conducting his business without any help.

As pointed out in our main brief, the public policy of the State, when it involves an infringement upon the con-

stitutional privilege of freedom of speech, is not controlling upon this Court, whether that policy be declared by the legislative or judicial organ of the State.

Thornhill v. *Alabama*, 310 U. S. 88.
American Federation of Labor v. *Swing*, 312 U. S. 321.

Nevertheless, we consider it appropriate, in order to prevent the perpetration of a fraud upon this Court, to demonstrate that the public policy alleged by the Respondents does not and never has in fact existed.

With respect to a legislative declaration of such public policy in New York little need be said. The Respondents have not pointed out and cannot point out any legislative declaration. Such legislative expressions of policy as do exist support the aims sought to be achieved by the petitioners:

New York State Labor Law, Sections 161, 169, 169-a, 700-716.
New York Civil Practice Act, Section 876-a.
New York State Constitution, Article I, Subdivisions 8 and 17.
New York State Penal Law, Section 2143.

Among the statutory provisions above cited it may be noted that there are provisions requiring one day of rest in seven for various types of employees (Labor Law, Sections 161, 169, 169-a), and a provision prohibiting all labor on Sunday, except works of necessity and charity (Penal Law, Section 2143).

With respect to judicial declarations of policy, the comparatively recent opinion of the Court of Appeals in the case of *Baillis* v. *Fuchs*, 283 N. Y. 133 (1940), is illuminating.

In the *Baillis* case, in order to avoid labor disputes, four brothers, who were co-partners, decided to operate their business without any employees whatever, and they

thereupon performed all the work themselves. Despite this determination by the proprietors of this business, the members of a union, some of whom had previously been employed by these proprietors, caused their place of business to be picketed for the purpose of gaining employment. Upon these facts the Court of Appeals found that a labor dispute within the meaning of the New York statute existed, and that the proprietors of the business *were not entitled to an injunction prohibiting the aforesaid picketing.* This result was reached in the face of a declaration by the plaintiffs that "they do not intend to hire any new employees" (283 N. Y. 133, 136).

Thus it is clear that the small proprietor's "necessity" or desire for employees is not the factor upon which the New York Court of Appeals, expressing the common law doctrines of the State of New York, pivots its decisions with reference to the legality of picketing.

On the contrary, the opinion in the *Baillis* case explicitly declares that the Court of Appeals relies wholly upon the factor of "employment" as the test. The "first essential" for a "labor dispute" is unequivocally declared to be "employment" (283 N. Y. 133, 137). Using "employment" as the key to its rationale, the opinion of the Court of Appeals in the *Baillis* case proceeds to construct a tortuous path wherewith to connect its various decisions starting with *Thompson* v. *Boekhout*, 273 N. Y. 390 (1937) and concluding with *Baillis* v. *Fuchs*. "Necessity" or lack of "necessity" of help does not enter into the Court's discussion at any point in the *Baillis* case or in any other opinion of that Court with which we are familiar. We have already quoted and discussed the language of the Court of Appeals in the case of *Operation Tour* v. *Weber*, 285 N. Y. 384 (1941), in our main brief (pp. 17, 28-30), and shall refrain from repetition here. Suffice it to note here that the reference to the case at bar which is found in the opinion in that case contains

no allusion whatever to "unnecessary labor" (285 N. Y. 348, 357).*

In view of the foregoing, it is obvious that there can be no sound distinction drawn between the case of *American Federation of Labor* v. *Swing*, supra, and the case at bar. In each case the arbitrary rule enunciated by the State Court, as a justification for its injunctive interference with picketing, was, essentially, that picketing was not permissible in the absence of the conventional employment relationship. In neither case was there any factual study, or other proof in the record, which established the existence of a recognized danger against which the injunction might properly issue. In both cases, therefore, the encroachment upon the constitutional priyilege was without justification.

POINT III

The injunction of the State Court gains no validity by limiting its prohibition to picketing.

It is argued by the Respondents that because the injunction in question is directed solely against picketing and does not interfere with other forms of publicity, it, therefore, may be deemed a "narrowly drawn" injunction and does not violate the constitutional guarantees. It is further argued that the Petitioners have erred in describing such an injunction as "absolute" in character.

These arguments completely overlook the fact that picketing was the sole type of activity in which the Petitioners

* In the case at bar the record established that the Respondent Wohl had previously engaged an employee as a relief driver. See Findings Nos. 43, 47 (R. 54). Also it established that both Respondents had previously signed applications for membership in the Union. See Finding No. 36 (R. 52-53). There was therefore "employment" by at least one of the Petitioners, and the Petitioners and Respondents were interrelated through the Union organization. This situation, obviously, is fundamentally different from that presented in cases where a small merchant is picketed solely for malicious purposes.

engaged in the labor dispute in question in the case at bar. Accordingly, by enjoining such picketing the State Court completely stifled the Petitioners' activities. The injunction does not limit its scope to acts of violence, fraud, disorder, or any other acts of a character recognized as tortious. It is, therefore, ridiculous to argue that the injunction limits its effect to the prevention of specific wrongs. Beyond question, what it does do is prohibit absolutely the activity known as picketing, which this Court has definitely recognized as a valid mode of free speech.

It is, of course, not for the Respondents to dictate in what manner the members of the Union shall proceed with their peaceful and orderly program to eradicate the economic evils of the peddler system. It is not always possible to organize an entire industry simultaneously. There are occasions when, under the particular circumstances involved, common sense suggests publicity by means of picketing. There are other occasions when appeals to the public by distribution of literature, by the publication of newspaper advertisements, or by radio broadcasting, may be more desirable. On still other occasions, the calling of strikes may be the chosen line of conduct. The Union may, in the exercise of its constitutional rights, resort to each or all of these courses of conduct, so long as it does so in a peaceful and orderly manner.

It is not for the State Courts nor for the Respondents to determine which modes of free speech are to be exercised and which modes are to be placed under a ban. No sound reason exists for singling out peaceful picketing from other activities.

It would appear that the Respondents definitely concede that, except for picketing, the members of the defendant Union are within the protection of the constitutional guarantees, for it is declared at page 8 of the Respondents' brief:

> "The only prohibition as far as the respondents' customers and bakeries are concerned is against picket-

ing. All other means are still at the disposal of the petitioners. The decree in no way affects the rights of the petitioners to expose the so-called evils of the peddler system and to bring such evils to the attention of the public and all those in the trade directly interested. The decree does not prohibit the Union from picketing all *other* bakeries and retail stores in the industry in their legitimate endeavors to prevent the spread and growth of the peddler system." (Italics ours.)

It is interesting to note that the Respondents apparently concede even that picketing may be lawful so long as it is directed against *others*.

Again, at page 9, the Respondents' brief declares:

> "The petitioners are at liberty, at any time, to take all customary steps, as other Unions have done, to attempt to destroy and liquidate the peddler system. They cannot, however, picket respondents' few manufacturers and small number of customers to compel the plaintiffs to hire unnecessary help and to abstain from performing all their work in their own business."

The distinction sought to be drawn between picketing and other forms of speech is utterly arbitrary and unwarranted. The Respondents have failed to show any grounds whatever for prohibiting the members of a labor union from giving publicity to their opinions by picketing, while permitting them to broadcast their opinions by the distribution of literature or by other means.

The Respondents here apparently rest their arguments largely upon the decision of this Court in the case of *Milk Wagon Drivers* v. *Meadowmoor Dairies*, 312 U. S. 287, wherein an injunction prohibiting picketing was upheld. In the *Milk Wagon* case, however, the injunction of the State Court was justified because of the extreme violence which permeated the defendant's activities, a situation

radically different from that of the case at bar where, admittedly, none but peaceful means have been employed by the Union.

Throughout their brief the Respondents have sought to create an impression that the activities of the petitioners herein were motivated by malice. We have pointed out the total lack of substance for this version of the facts. The injunction of the State Court cannot now be saved by presenting this Court with a deliberately distorted picture of the controversy.

In the case at bar the State Court ventured to interfere with the defendants' exercise of free speech solely because the State Court's notion of desirable labor policy conflicted with that of the Union. The State Court having found, however, that the Union acted in good faith (Finding No. 34, R. 52), the Court was powerless under our Federal Constitution to impose its opinions upon the petitioners.

CONCLUSION

The judgment of the Court of Appeals of the State of New York should be reversed.

Respectfully submitted,

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